In the Supreme Court of the

United States

October Term, 1973

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MICHAEL RODAK, JR

No. 73-1524

HALLMARK INDUSTRY,

Petitioner,

vs.

REYNOLDS METALS COMPANY, STANRAY PACIFIC CORPORATION and HARVEY ALUMINUM (INCORPORATED),

Respondents.

Joint Brief in Opposition to Petition for Writ of Certiorari

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Respondents.

Joint Brief in Opposition to Petition for Writ of Certiorari

Respondents Reynolds Metals Company ("Reynolds"), Stanray Pacific Corporation ("Stanray") and Harvey Aluminum, Inc. ("Harvey") respectfully request that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

Petitioner reproduces as Appendices A, B and C to its Petition the opinions of the courts below concerning the merits of this case. As a part of its Petition, however, Petitioner raises as a ground for granting certiorari the procedural question of the timeliness of the respondents Reynolds' and Stanray's post-verdict motions. (Petition,

hereafter "P", pp. 48-52) Petitioner omits to report the following prior rulings on the timeliness question, rulings which we believe should be before the Court and which are dispositive on this issue:

A. Shortly after said post-trial motions were filed, Petitioner moved to strike them as untimely on the ground that the entry of the jury verdict rather than the entry of judgment started the running of time for the filing of such motions. The District Court's denial, on September 8, 1970, of this motion to strike is unreported.

B. Petitioner then sought in the Court of Appeals for the Ninth Circuit a petition for writs of mandamus and/or prohibition seeking to have vacated the District Court's granting of respondents' post-trial motions. Again it urged that the motions were filed too late, and the trial court's consideration of them was outside its jurisdiction. Upon review of the briefs in the matter, and without calling for oral argument, the Court denied the petition and held that the motions were timely made. (Opinion attached as Appendix 1 to this brief.)

C. Petitioner then filed a Petition for Writ of Certiorari in this Court, seeking review of the Ninth Circuit's denial of its Petition. In that Petition, Hallmark, at somewhat greater length, made the same arguments it here repeats. Certiorari was denied. *Hallmark Indus. v. Peckham, U.S. District Judge,* 403 U.S. 932 (1971).

QUESTIONS PRESENTED

Even though Petitioner would have this Court believe that nothing less than the role of the jury in antitrust cases and the direction of our national economic policy are at stake in this action (P. pp. 3, 4) the sole issue legitimately presented by the Petition is factual, and limited

to a single government contract. No new principles of law are presented, and the courts below followed well-established precedents in this Court and in lower federal trial and appellate courts. The issue on the instant Petition is whether this Court should undertake a *de novo* review of the trial record in this case to decide whether the courts below rightly determined that:

A. There was insufficient evidence, as a matter of law, to sustain the jury's verdict for Hallmark and against Reynolds and Stanray to the effect that the latter companies had engaged in a conspiracy in restraint of trade; and

B. There was insufficient evidence, as a matter of law, to create a jury question as to Petitioner's allegations that Stanray had attempted to monopolize; and

C. The excluded evidence relating to Harvey, when considered in the light of the entire record, could not as a matter of law, have sustained a verdict of conspiracy against that company or have disturbed the favorable verdict it received; accordingly, even if exclusion of that evidence were error, it would have been harmless.

We submit that no purpose would be served by another canvass of the record below. The District Court and the Court of Appeals proceeded under proper standards and procedures to reach correct results, which should not be disturbed.

STATEMENT OF THE CASE

If there were any doubt that Petitioner is here raising merely a question which turns on the particular facts of this case, that question is entirely dispelled by the Petition itself. Therein, Hallmark itself expresses the following as the central questions on review: "Whether the evidence, taken in the light most favorable to Petitioner Hallmark, establishes that the conduct of respondents Reynolds and

Stanray constitutes a violation of Section 1 of the Sherman Act",* and whether, moreover, the evidence, both that admitted and excluded as to Harvey, demonstrates its participation in the supposed conspiracy. (P., p. 4)

Thereafter Hallmark proceeds, over nearly twenty pages of its Petition, to argue facts. In doing so, it seems to be telling the Court that if it will merely immerse itself in this trial record, it might find what the two courts below could not find, factual support for its three-party conspiracy theory, and in so doing, will restore the jury verdict as to Reynolds and Stanray, and overturn it as to Harvey. However, Hallmark raises nothing it has not raised before; it does not suddenly find support for assertions it has never been able to support. The two courts below, upon close examination of these same factual arguments, and upon comparing them with the actual trial record, found them utterly unsupported and incapable of sustaining Hallmark's theories.

We do not conceive the task of this Court to be to make another examination of the record, and another comparison of arguments with facts. No purpose would be served by our joining issue with Hallmark once again with respect to its loose record recounting technique. That task has been successfully accomplished in the courts below. For present purposes, we see the need only to provide this Court with a brief summary of the undisputed facts from the trial record, relied on by the courts below to sustain their rulings, and persuasive to our argument that the present Petition raises nothing more than fact questions which were rightly decided below.

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*Both courts below regarded this very same question as before them (P., Appendix A, p. ii; P., Appendix B, p. xxii), and they resolved it against Petitioner in each instance.

The trial evidence disclosed that in March 1966 the United States Army issued a Request for Proposals to supply 3,000 prefabricated aluminum hut kits. (Pf's Ex. 1, Tr. 1865-66)* The next month, twenty-six companies submitted bids on the contract, including Hallmark, Reynolds and Stanray. (Tr. 1867) However, at the very outset the Army found the Reynolds bid to be unacceptable, and in early May 1966, that company was notified that its proposal was no longer under consideration. (Tr. 2343-47, 2975)

The record is also clear that Reynolds was interested in the project not only as a bidder but also as a supplier. Upon learning of the Government's requirement for 3,000 buildings, it not only submitted its own bid, but also began a nationwide effort to locate potential bidders for the contract to supply their aluminum material needs. (Tr. 929, 2962-63, Dfs' Ex. E-51 through E-54) In that supplier capacity, Reynolds became familiar with the requirements of both Hallmark and Stanray and offered its assistance to each. The record is clear that only Hallmark found its offer acceptable.

In April, 1966, Reynolds' representatives met with Hallmark personnel to determine whether Reynolds could supply Hallmark (Tr. 2356-57, 2500-05, 191) At the end of this meeting the parties had reached a loose understanding that if Hallmark were the successful bidder, it would contact Reynolds for further exploration of available products and services. (Tr. 2501)

The record is also clear that in May, 1966, Reynolds made a sales call on Stanray, hoping to supply aluminum to that company if it were the successful bidder. With regard to

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*Again in its Petition, Hallmark begins "the unfolding of its story" in January, 1966 with a supposed agreement between Reynolds and Stanray jointly to promote a hut requirement. The Court of Appeals, however, could find no competent proof in the record that such an agreement was reached. (P., Appendix B, p. xv)

this contact, the Court of Appeals found only the following facts in the record: "Reynolds' engineers made a trip to Stanray's Los Angeles plant to see if Reynolds could supply Stanray's requirements. They determined they could not." (P., Appendix p. xvi) (See e.g., Tr. 1216, 2369-70, 2527, 2531) Thus, before beginning its final negotiations with Hallmark, Reynolds realized it had no sales opportunity with Stanray.

At Hallmark's request, the Reynolds' representatives then traveled to Hallmark's plant in Patterson, California. Once there, upon analyzing Hallmark's material needs, and working from available plans and drawings, they determined that Reynolds could provide all of the metal required for the Hallmark hut in fully fabricated form for $1,900,000. (Tr. 2377-85) Hallmark considered this price attractive for the package of goods and services involved. (Tr. 206, 371-372, 2414-15)

The matter then turned to the credit terms to be applied to the order. At the time a credit decision was being made, the Reynolds' credit representatives had before them the fact that Hallmark was virtually insolvent: it had substantial past due debts, had a deficit net worth, lacked working capital, had not for any accounting period in its history generated a profit (and, indeed, in the prior two years had suffered substantial losses), and had absolutely no unencumbered cash or other assets. (Dfs.' Exs. K, E-46, E-50, Tr. 488-93, 517-18)* Based on this credit position, and a

*Petitioner proposes to this Court that on the day this credit decision was made, the only credit data the Reynolds' General Credit Manager had before him suggested Hallmark was a good credit risk. (P. p. 15) This assertion, as recognized by both courts below, is pure invention and was unsuppported by the record. The Reynolds' credit men involved in the decision appeared at trial, and carefully and thoroughly went over that decision. (Tr. 2638-72, 2728-56, 2776-79, 2810-12, 2855-57) They testified they had abundant credit data on Hallmark, all bad.

consideration of materials to be provided and the delivery schedule to be met under the proposed contract, Reynolds determined that the order required the full security of a letter of credit. (Tr. 2639-72, 2726-56, 2810-12, 2855-57)* Hallmark, however, rejected these credit terms and refused to buy from Reynolds. (Pf's. Ex. 74, Tr. 2592-93)

Indeed, even before so notifying Reynolds, Hallmark had commenced dealings with numerous other aluminum sources, including Harvey Aluminum. (Tr. 471, 584, 718, 3472-74) The record reflects that Hallmark and Harvey worked out a bill of materials, but again Hallmark's insolvent financial condition was a factor. (Tr. 3309-15, 3327-43) Harvey credit representatives, after reviewing all available credit data on Hallmark, and without consulting other sources, determined that a letter of credit would be required to support the order. (Tr. 3368-73) Hallmark declined, doubtless in order to be free to deal with Ador-Hilite,

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*As to this credit decision, the trial court proceeding from the facts contained in the record, reached the following conclusions:

> "The matter of the reasonableness of the letter of credit demand was the subject of testimony at trial. Witnesses for the defendants testified that the credit demand was reasonable, and the plaintiff did little, if anything, to controvert this testimony. None of the parties introduced independent expert testimony as to the appropriateness of the letter of credit."
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> "In the present case, Hallmark's financial position of near insolvency certainly indicated a non-conspiratorial motive on Reynolds' part for demanding reliable security on the supply contract. In Reynolds' judgment, a letter of credit for the full contract price was necessary."

The trial court's reading was supported and affirmed by the Court of Appeals:

> "With respect to the credit demand, certainly Hallmark's financial position of near insolvency provides a legitimate business motive for the credit requirement. See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). Moreover, Reynolds had nothing to gain by an unreasonable refusal to deal with Hallmark."

its ultimate supplier, not only of materials but also of financing needed by Hallmark for the project. (Tr. 555-71, Dfs' Ex. D-9 through D-17, Tr. 3366-67)

Stanray, meanwhile, wishing to remain in competition on the project, set to work with the aluminum supplier it had selected, *not* Reynolds but the George D. Widman Company,* to attempt to make its price more attractive to the Government. (Tr. 1217, 1218, 1231, 1290-91, 1323-27) The Army, however, was not interested; it had decided to purchase from Hallmark, and had begun final negotiations to that end.

As a part of the final negotiations, and prior to the time the contract herein was executed, Hallmark was required fully, completely and accurately to disclose to the Government its estimated costs for performing the work. This cost data in turn formed the basis of the contract price.** On the day Hallmark reached final agreement with all suppliers, including its aluminum supplier, its President signed and transmitted to the Army a document containing these necessary cost disclosures as of that date, plus the agreed to job profit rate. (Dfs' Ex. F-4, Tr. 649-50) The Government contract, ultimately signed on June 6, 1966, was for the total amount appearing on this document. On the witness stand, Hallmark's President admitted that the permissible net profit allowable on the contract, as contained in this form and incorporated into the final contract, was achieved by Hallmark in its contract performance, and then some. (Dfs. Ex. V-6, E-17, Tr. 664, 670-75, 540-42, 3465-66)

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*While Petitioner has much to say about Stanray's few contacts with the George D. Widman Company, it disregards the uncontradicted fact that the George D. Widman Company willingly supplied Petitioner with a substantial portion of the aluminum used by Petitioner to perform the government contract involved in this action. (Tr. 313-15)

**10 U.S.C.A. § 2306(f); ASPR 32 C.F.R. § 3.807.3(c).

It was this record, and not what any of the parties represented or hoped the record to be, that provided the point of departure for the courts below. The trial court ruled that the record did not support the verdict against Reynolds and Stanray, and the Court of Appeals affirmed. Moreover, the Court of Appeals ruled that Hallmark had not been prejudiced in any way by the trial court's exclusion of certain evidence regarding Harvey. These rulings raise no questions meriting this Court's consideration, were proper and correct, and should not be disturbed.

REASONS FOR DENYING THE WRIT

The present case as to Reynolds and Stanray involves nothing more than the time-honored practice of a federal trial court in granting post-verdict motions when it finds that the record evidence does not sustain the verdict. As to Harvey, which received a favorable jury verdict, Petitioner only questions evidentiary rulings by the trial court, which the Court of Appeals held to be non-prejudicial in any event. In affirming the trial court's decision and rulings, the Ninth Circuit applied proper standards of review and followed well-established precedents. Its holding is not in any way in conflict with the holdings of this Court or any circuit, and this case presents no important question of federal law for resolution by this Court. Moreover, the timeliness of respondents Reynolds' and Stanray's post-trial motions has been established in this litigation and is supported by direct authority of this Court.

I. The Petition Presents No Important Question of Federal Law.

A. The Petition seeks only to reopen a purely factual inquiry.

The only real questions Hallmark raises in its Petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, Petitioner asks

this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have been utterly unable to find—proof of conspiracy and proof of a unilateral attempt to monopolize. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below are treated with and entitled to great weight. In that regard, this Court has stated: ". . . a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings by two courts below in absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.,* 336 U.S. 271, 275 (1949). In the present case, Pettioner raises only questions turning entirely on the facts of this case, already resolved twice in favor of respondents, and without any impact outside the limits of this case. Certiorari, therefore, should be denied.

B. The courts below pursued proper procedures and applied proper standards in ruling that the evidence failed to sustain the jury verdict against Reynolds and Stanray.

Not only do the decisions below not present legal questions of general interest, such questions as they do raise were correctly resolved below and should not be disturbed. We do not dispute that the jury in this case found against Reynolds and Stanray.* The *fact* of a verdict, however, does not *ipso facto,* create the necessary record support for that verdict, as Petitioner seems to urge. Respondents, by the well-established procedure of post-trial motions under

*Nor, of course, can Petitioner deny that the jury found in favor of Harvey.

Federal Rules of Civil Procedure 50 and 59, challenged the existence of such evidentiary support for the verdict. The trial court, then, after full briefing, record review and argument, determined that the evidence did not sustain the verdicts, and granted the motions. The trial court's ruling in this regard was then sustained by the Court of Appeals.*

Petitioner does not; and cannot, argue that the courts below followed improper standards in ruling on these motions, for both followed well-established law to guide them. In this regard, the Court of Appeals stated:

> "The standard by which a judgment notwithstanding the verdict is measured is precisely the same as that for a directed verdict. *Juhnke v. Eig Corp.*, 444 F.2d 1323, 1325 (9th Cir. 1971); 9 Wright & Miller, *Federal Practice and Procedure* § 2537 (1971). The plaintiff still has the burden of establishing a *prima facie* case although he is entitled to the benefit of all favorable inferences which can be drawn from the evidence. *Independent Iron Works v. United States Steel Corp.*, 177 F.Supp. 743, 746 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *Juhnke v. Eig Corp., supra*, 444 F.2d at 1325."

Petitioner rather takes issue with the result produced by the application of these standards to the facts of this case. We believe, however, the result is as non-controversial as the standards themselves.

It cannot be denied that the essential issue at trial relating to Reynolds and Stanray was ". . . whether the Reynolds' demand for a $1.9 million letter of credit resulted

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*Petitioner attempts to make something of the similarities between respondents' briefs below and the court's rulings. (P., p. 9) To the extent there is any such congruence, it no doubt results from the fact that both the briefs and the opinions proceed from a common source: the record.

from a conspiratorial agreement between Reynolds and Stanray." In that regard, two successive courts found the following undisputed facts in the record: that Reynolds worked with both Hallmark and Stanray on their respective contract bids; that Stanray became familiar with the fact that Reynolds was working with Hallmark, incorrectly believed that Reynolds was financing Hallmark, and attempted to discover what kind of special aid Reynolds was offering Hallmark; and that Reynolds offered to supply Hallmark with aluminum materials if Hallmark, in turn, would secure the sale with a letter of credit. Hallmark urged throughout that these facts alone would support the reasonable inference of conspiracy. Both courts, however, firmly disagreed.

Applying proper authority, principally this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), they ruled that no reasonable inference of conspiracy could be drawn from these facts in light of the uncontradicted evidence in the record that Reynolds had a common sense, legitimate business motive for requiring a letter of credit from Hallmark, and that Reynolds had no motive for preferring Stanray over Hallmark.*

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*The Court of Appeals stated:

"With respect to the credit demand, certainly Hallmark's financial position of near insolvency provides a legitimate business motive for the credit requirements. [footnotes omitted] See *Joseph C. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). Moreover, Reynolds had nothing to gain by an unreasonable refusal to deal with Hallmark. The credit demand actually resulted in the loss of a $1.9 million opportunity for Reynolds. There was no reason for Reynolds to favor Stanray over Hallmark since the Reynolds' engineers had already determined that they could not supply Stanray with its needs. Even if Reynolds could have supplied the aluminum for Stanray's design, there was no reason to expect that Reynolds' refusal to sell to Hallmark would result in Stanray's obtaining the contract. Several other companies could have supplied Hallmark with its aluminum requirements."

Hallmark makes a third attempt in its Petition to address itself to questions of the reasonableness of the letter of credit and the supposed motive Reynolds had for conspiring, but does so once again with argument rather than facts in the record. For example, it asserts that Reynolds' actual credit exposure was less than the full value of the letter of credit (P., p. 26); but again without citation to record. This omission no doubt results from the fact that the record contains no such proof.*

Petitioner again re-argues that Reynolds would have realized ". . . more profit in supplying Stanray . . . ." (P. p. 26) and that Stanray would ". . . have purchased a greater quantity and a more expensive grade of aluminum from Reynolds . . . ." (P. p. 27). Again, no record citations appear in support of these statements. This omission is explained by the fact that the clear record, as noted by both courts, showed that Reynolds had *no* sales opportunity with Stanray. Its opportunity as an aluminum supplier lay with Hallmark alone of the contending bidders.

In summary, we submit that the courts below proceeded according to proper standards in ruling on the post-trial motions. They viewed the facts in the record concerning the alleged conspiracy as they were, rather than as any party would have them to be, and applied principles established by this Court in ruling that the record, as found, failed to support any reasonable inference of conspiracy. We believe that decision was inescapable on the existing record, and should not be disturbed.

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*There was proof in the record that, well after the credit decision was made, Reynolds' credit representatives, still desirous of working out a basis for dealing with Hallmark, discussed with the Army a change in the delivery schedule which would have reduced Reynolds' credit exposure. (Tr. 2826-30, Appendix A to Appellee's Responsive Brief in the Ninth Circuit). This proposal was never pursued because Hallmark found other suppliers.

C. The rulings by the courts below are consistent with the right to a jury trial and in service of that right.

It is absurd to suggest, as Petitioner does, that the granting of judgment notwithstanding the verdict ". . . improperly and unconstitutionally invaded the province of the jury . . . ." (P., pp. 3, 10) or ". . . is in derogation of the right to trial by jury . . . ." (P., p. 48) The Seventh Amendment, which defines the parameters of the right to trial by jury, explicitly provides that ". . . no fact tried by a jury shall be otherwise reexamined in any Court of the United States, *than according to the rules of the common law.*" (emphasis added) It is quite clear that judgments notwithstanding the verdict have been and are recognized at common law, and thus are consistent with the Seventh Amendment, 5 *Moore's Federal Practice* para 50.07[1] at 2354. Courts have universally held that the practice of granting judgments n.o.v. is constitutional. *Manaia v. Potomac Elec. Power Co.*, 268 F.2d 793 (4th Cir. 1959), *cert. denied*, 361 U.S. 913 (1959).

Moreover, the grant of judgment notwithstanding the verdict in a proper case, as here, has been held to be one of the historic safeguards of the right to trial by jury. *Capital Traction Co. v. Hof.*, 174 U.S. 1, 13, 14 (1899) ("Trial by jury . . . is a trial by a jury . . . in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside their verdict if in his opinion it is against the law or the evidence."); *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95 (1931); *Christie v. Callahan*, 124 F.2d 825, 827 (D.C. Cir. 1941). Thus, the Petition gains no stature or persuasive effect by the injection of this wholly spurious jury trial issue.

II. The Courts Below Properly Ruled That No Jury Question Was Presented by Petitioner's Allegations That Stanray Attempted to Monopolize.

The Court of Appeals, measuring Stanray's activities against a standard most favorable to Petitioner, found nothing in the extensive record to support Petitioner's contention that Stanray attempted to monopolize in violation of Section 2 of the Sherman Act. The uncontradicted evidence in the record, much of which was introduced by Petitioner itself and all of which was carefully reviewed by both the District Court and the Court of Appeals, conclusively shows that there was and is no basis for Petitioner's Section 2 charges.

The relevant portions of the record, which Petitioner chooses not to mention, show an intensively competitive industry, easily entered, in which Stanray had no position at all. Stanray, a structural steel company, (Tr. 1176) was not in the business of manufacturing prefabricated buildings (Tr. 3184-85). Many years before the government contract in issue in this case, Stanray's predecessor had sold some aluminum buildings for use by the Atomic Energy Commission (Tr. 1193-94). In 1966, Stanray pulled its old design out of storage and unsuccessfully bid on two metal building contracts (Tr. 1007-08). There was active competition between steel and aluminum building manufacturers for these contracts (Pf's Ex. 38), and the first contract on which Stanray bid was awarded to a company which had bid to supply steel buildings (Tr. 1016-17). In addition, the contract in the present case, on which over one hundred companies were solicited with requests for proposals (Tr. 1864-67) was awarded, not to Stanray, but to Petitioner, a steel building manufacturer which had never produced or sold aluminum buildings (Tr. 172), but

which had determined that its steel fabrication equipment would work equally well with aluminum (Tr. 173-74).*

Stanray, far from possessing power to control prices or to exclude competition, could not even obtain either of the two contracts for prefabricated buildings on which it had bid. In fact, there is nothing in the record to show that Stanray, during the relevant time period, had made even a single sale of an aluminum building.**

In addition to the proven intensively competitive structure of the industry, there is not a shred of evidence in the record to support an inference that Stanray had the specific intent to monopolize or do anything but to compete for a single, specific government contract. To the contrary, the only evidence in the record of Stanray's intent, which evidence is uncontradicted, was that Stanray was interested only in selling a building using its pre-existing tooling and equipment, and had no intention of modifying its pre-existing design in any substantial respect or to enter the market generally for supplying prefabricated metal buildings. (Tr. 3184-85).

Because of the total absence of any evidence in the record to support Petitioner's charges that Stanray had attempted to monopolize, defendant Stanray moved for a directed verdict at the close of plaintiff's case, and again at the close of the trial. The motion was made on the

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*Petitioner's President conceded that there were probably *1,000* companies capable of producing the product in question. (Tr. 2013), and the record shows that any company capable of manufacturing prefabricated steel buildings could produce such aluminum huts (Tr. 173-74).

**The freedom and ease of entry into the prefabricated building industry is exemplified by the contract in issue. Petitioner realized nearly a half million dollar profit on that contract, in spite of its deficit net worth at the time it bid and despite its never having previously produced an aluminum building.

grounds that there was no evidence to show that Stanray had the specific intent* to achieve monopoly power, *i.e.*, the power unilaterally to control prices and to exclude competition at will;** that there was no evidence to show that Stanray had come dangerously close to achieving monopoly power;*** and that there was not even evidence in the record defining the relevant market† which Petitioner contended Stanray had attempted to monopolize. The District Court granted the motion‡ just before the balance of the case was submitted to the jury.

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*See, *e.g.*, *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945); (". . . conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent'; an intent which goes beyond the mere intent to do the act.")

***United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.")

***See, *e.g.*, *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) ("The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . .")

†See, *e.g.*, *Walker Process Equipment, Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) ("To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power . . . in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition.")

‡In a cavalier disregard for the content of the record, Petitioner asserts (P., p. 32) that the directed verdict was granted "solely on the ground that a relevant market had not been proven. (T. 3625)." Petitioner's record reference contains absolutely no support for this statement, and the entire record is devoid of any statement by the trial judge which would justify such a narrow inference.

On appeal, the Ninth Circuit found it unnecessary to consider the evidence concerning the relevant product market, Stanray's power in the market or whether Stanray had attained a position dangerously close to monopoly. The Circuit Court directed its attention to the issue whether plaintiff proved the requisite "specific monopolistic intent" on the part of Stanray. After considering exhaustive briefs on the subject, and after reviewing nearly 4,000 pages of transcript, the Ninth Circuit found, as had the District Court, that there was absolutely no evidence in the record to support the intent to monopolize element of the offense. Thus, the Ninth Circuit held that even when the evidence was viewed most favorably for Petitioner, the only inference of intent that could be drawn was that Stanray intended merely to obtain a single contract award from the government. Accordingly, it held, as was compelled by the record, that the directed verdict in favor of Stanray on the Section 2 issue was correct as a matter of law.

III. The Court of Appeals Correctly Ruled That Even Had Certain Disputed Evidence Against Harvey Not Been Excluded as It Was Under Recognized and Well-Established Evidentiary Principles, but Had Been Admitted, No Sufficient Proof of Conspiracy Would Have Arisen Against Harvey.

Following the trial of this case, the jury returned a verdict in favor of defendant-appellee Harvey Aluminum (Incorporated) ("Harvey"). Plaintiff asserts in its Petition, as it did in the Court of Appeals for the Ninth Circuit, that the District Court committed prejudicial error by excluding from the evidence five documents written by a former Harvey salesman named Donald Shrank. Neither those documents (in the nature of daily sales logs) nor their contents ever came to the attention of Richard Parker, Harvey's Credit Manager, who alone decided upon the

terms under which Harvey would agree to do business with Hallmark. (Tr. 3522, 3369-73)

At the District Court, Hallmark repeatedly sought to introduce the documents into evidence, relying in turn upon virtually every recognized exception to the hearsay rule. However, the District Court held that the documents were not admissible under the "Business Records" Act (28 U.S.C. § 1732); that they were not admissible under any other exception to the hearsay rule; that they were not admissible for any non-hearsay purpose; and that, in any event, the documents contained "undue opinions, conclusions and impressions". (Tr. 1000)

Each of the documents in issue constitutes "double" hearsay—that is, each document is an extrajudicial statement by Shrank which purports to record or comment upon statements allegedly made to him by others, which are themselves hearsay statements. Hallmark urged many different theories upon the District Court for the admission of the documents, and in each instance the District Court correctly held that the proffered evidence failed to meet the requirements of the rule of evidence involved.*

In the Court of Appeals, Hallmark argued again on each of the same grounds that the documents should have been accepted as evidence by the District Court. Harvey demonstrated again that the documents were not properly admissible under any of the applicable rules of evidence. Moreover, Harvey demonstrated that even if the documents had been incorrectly excluded, it was clearly harmless error for several sufficient reasons:

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*In addition to rejecting the documents under the "Business Records" Act, the District Court declined to accept them as "declarations of a conspirator" in furtherance of a conspiracy; as declarations against interest; for the purpose of impeaching the veracity of witnesses; or for the purpose of showing "notice, motive or intent."

1. Each *fact* contained in the documents (as distinguished from the opinions, conclusions and conjecture, with which they are intermixed) was before the jury in the form of other evidence;

2. Even if there had been evidence of a Harvey-Stanray agreement, which there was not, there was no evidence of an unreasonable restraint of trade; and

3. Even assuming a violation of law, there was no evidence to support a finding that Hallmark was injured.

The Court of Appeals (affirming the judgment in favor of Harvey), found it unnecessary to reach the question whether the documents had been improperly excluded because if there was error it was clearly harmless:

> "If the evidence had been admitted at trial, the evidence against Harvey, taken as a whole, would not have been sufficient to support a verdict in favor of appellant. Therefore, if any error was committed by the trial judge, it was harmless because it could not have prejudiced the substantial rights of appellant." (P. Appendix B, p. xxv)

Both the District Court and the Court of Appeals were clearly right in their rulings on this matter. Hallmark has failed to set forth in its Petition a single reason why those rulings should be disturbed by this Court.

IV. The Alternative Grounds for the District Court's Opinion.

The District Court, in granting judgment notwithstanding the verdict, ruled not only that the record evidence was insufficient to support the verdict, but also that, assuming arguendo an agreement between Stanray and Reynolds, that agreement would not have created an unreasonable restraint of trade, and, in any event, there was no *prima*

facie evidence that the acts of the respondents caused damage to the Petitioner. The Court of Appeals, however, did not find it necessary to consider these alternative bases for the District Court's ruling: "Since we have decided the evidence was insufficient to sustain the jury's verdict, we need not reach the other two grounds upon which the trial judge based his opinion." (P., Appendix B, p. xxiv) Nor did the Court of Appeals find it necessary to examine the trial court's alternative grant of a new trial.*

Petitioner, however, in an apparent effort to add heft, if not strength, to its Petition, attempts to inject these very issues, which formed no part of the Court of Appeals' opinion below, into this proceeding. While we submit that, upon examination, it would be clear that the alternative grounds for the District Court's opinion are also valid, this Court, like the Court of Appeals, need not reach these issues in order to dispose of the Petition.

V. This Court Has Already Denied Certiorari on Petitioner's Argument That Respondents' Motions Were Untimely Filed.

Finally, Petitioner argues that, somehow, the trial judge erred in entertaining respondents' post-trial motions because they were not timely filed. As disclosed above (Opinions Below, p. 2), and apparently forgotten by Petitioner, this very same question of the timeliness of the motions

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*The trial court, in the exercise of its sound discretion, determined that in the event its ruling as to judgment n.o.v. were disturbed, which it was not, that there should be a new trial. The basis for its new trial ruling was that in the conscientious opinion of the trial court the verdict was contrary to the evidence, and it would work substantial justice to grant the motion (relying upon *Simpson v. Union Oil Co.* 411 F.2d 897, 908 (9th Cir. 1969), *aff'd in relevant part*, 396 U.S. 13 (1969); 6A *Moore's Federal Practice* § 59.05[5]. As this Court has recognized, *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940), such a finding by a trial court fully and completely supports the discretionary grant of a new trial.

was not only resolved against Petitioner by the trial court, but by the Court of Appeals as well which held that: ". . . judgment [in this action] was not entered until June 29, 1970, and respondents' motions for judgment notwithstanding the verdict and for a new trial were timely. . . ." (Order February 11, 1971, Appendix 1).* Petitioner sought review of this Order in this Court, by way of a Petition for a Writ of Certiorari, and said writ was denied.

This second effort by Petitioner to obtain a grant of certiorari on this same issue raises nothing new. Indeed, it is merely a replay of the same argument made more laboriously, at greater length, and without success earlier. It has certainly gained no persuasive effect by the mere passage of time.

Rule 58 of the Federal Rules of Civil Procedure is very clear as to what constitutes the entry of final judgment. It provides, in relevant part:

> "Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court . . . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a) . . . ."

---

*Again, in its appeal on the merits before the Ninth Circuit, Hallmark raised the timeliness argument, and again it was rejected:

> "Appellant again raises the issue of the District Court's lack of jurisdiction to entertain appellees' motions for judgment n.o.v. or for a new trial. The question was raised in this court previously and was denied. *Hallmark Industry v. Peckham*, No. 26915 (9th Cir., Feb. 11, 1971). We do not disturb that decision."

With the actual Rule to guide us, it is clear that on June 24, 1970, the date Petitioner urges as the date of judgment, all that occurred was entry of the jury verdict.* It was then on June 29, 1970, that the clerk, pursuant to the mandates of Federal Rules of Civil Procedure 58, 77 and 79, prepared, signed and filed a separate document entitled "Judgment," entered in the docket the following notation—"Entry of Judgment"—and mailed the following notice to all parties of record:

> "YOU ARE HEREBY NOTIFIED that on June 29, 1970 a DECREE JUDGMENT was entered of record in this office in the above-entitled case."

We submit that this record demonstrates beyond doubt that under the explicit provisions of Rule 58, judgment was entered on June 29, 1970. As a result, when respondents filed their post-trial motions within ten days thereafter, said motions were timely.

Neither does Petitioner aid its argument by urging, also for a second time before this Court, that the rulings of the courts below are inconsistent with this Court's decision in *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958). In placing such reliance on a supposed conflict with *Schaefer*, Petitioner seems to have entirely overlooked this Court's recent Per Curiam opinion in *United States v. Indrelunas*, 411 U.S. 216 (1973). There, in speaking of the *Schaefer* case, this Court stated:

---

*Petitioner makes much here, as it did in its prior petition for a writ of certiorari on this point, of a statement made by the Trial Judge in colloquy with counsel after the jury returned its verdict. (P, p. 40) It is clear, however, that the statement reflected nothing more than the court's expectation that the clerk would enter judgment as of that day. In fact, however, no judgment was filed or entered on that day, as the trial judge later recognized when he entertained the post-trial motions.

> "The reason for the 'separate document' provision is clear from the notes of the advisory committee of the 1963 amendment. See Notes of Advisory Committee following Fed. Rule Civ. Proc. 58, reported in 28 U.S.C. Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. See, *e.g., United States v. F. & M. Schaefer Brewing Co.,* 356 U.S. 227 (1958). To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document." (At p. 220)

Moreover, the *Indrelunas* case directly supports the decisions below in this case, for there the court held that the entry of a jury verdict did not satisfy the Rule 58 requirement of a separate document. It stated that, while this requirement may be mechanical it ". . . must be mechanically applied in order to avoid new uncertainties as to the date on which judgment is entered." (411 U.S. 216, 222) To the extent then that there was ever any question in this case as to when judgment was entered, which we doubt, there can be none now. It was beyond doubt accomplished on June 29, 1970, and not before.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated: May 9, 1974

Respectfully submitted,

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(Appendix 1 Follows)

Appendix 1

United States Court of Appeals
for the Ninth Circuit

No. 26,915

Hallmark Industry,
Petitioner,

vs.

Honorable Robert F. Peckham, Judge of the United States District Court for the Northern District of California,
Respondent,

And

Reynolds Metals Company, and Stanray Pacific Corporation,
Real Parties in Interest.

ORDER

Before: Hamley and Hufstedler, Circuit Judges

The petition of Hallmark Industry for writs of mandamus and/or prohibition is denied on the ground that judgment was not entered until June 29, 1970, and respondent's motions for judgment notwithstanding the verdict and for a new trial were timely. (Rule 58, Fed. R. App. Proc.)

/s/ Frederick G. Hamley,
/s/ Shirley Hufstedler,
Circuit Judges.

Filed, February 11, 1971,
Wm. B. Luck, Clerk.

REPLY BRIEF OF PETITIONER

MAY 23 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1524

HALLMARK INDUSTRY,
Petitioner,

vs.

REYNOLDS METALS COMPANY, STANRAY PACIFIC COMPANY and HARVEY ALUMINUM, INC.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
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United States

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VS.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This case is being used as authority to circumvent the "consequences" of this Court's opinion on *Poller v. CBS,* 368 U.S. 464 (1962). *Since* the filing of this Petition, counsel for one of these Respondents successfully urged a District Court, based upon *this* case, to vacate another antitrust verdict in favor of a plaintiff. *Walsh v. Burroughs Corporation,* N.D. Cal., Civ. No. C-71-479-SAW (May, 1974). In that case, as distinguished from what the

Respondents assert in this Court, counsel argued the importance of *this* case as follows:

> "Out of the *Poller v. CBS* and a series of litigated litigations (sic) has come a principle that summary procedures such as motions to dismiss without leave to amend, summary judgment should be sparingly used in anti-trust cases. The consequence has been that more and more the inclination is to permit matters to go to the jury which might not otherwise go to the jury. But this history that we have witnessed and are witnessing has not been characterized by a failure of the District Courts to grant in cases that they deem appropriate judgments notwithstanding the verdict and new trial and we have seen no reluctance in the Circuit Courts to uphold such judgments and decisions by the lower Courts.
>
> "The most recent case that I am aware of in this district is *Hallmark v. Reynolds Metal Corporation* which has been affirmed in the Ninth Circuit and application for certiorari is now pending in the Supreme Court." *Walsh v. Burroughs Corp.*, supra, (Tr., May 2, 1974, pp. 2, 3.)

This case was also successfully used in *Coin Automated Products v. Maytag Company,* N.D. Cal., Civ. No. C-70-2519-SW (July, 1973) in which a different District Court vacated another antitrust verdict in favor of a plaintiff on the evidence. The defendant, extensively quoting from the District Court in *this* case, argued that the Court could second-guess the jury's finding on motive and intent.

> "There was no economical or anticompetitive reason for the Maytag Company to want to put the plaintiff out of business, which makes this similar to *Hallmark v. Reynolds Metals Co.,* 1971 Trade Cases ¶73,409

(N.D. Calif. 1970), cited in defendant's main brief at p. 19." *C.A.P.E. v. Maytag Co.*, supra, Def. Rep. In Support Mo. Jud. NOV and/or New Trial, p. 31, et seq.

The *Burroughs* and *Maytag* cases illustrate the growing cancer which *this* case has started on the great body of law developed by this Counrt in favor of the private enforcement of the antitrust laws and the plaintiff's right to a trial by jury in antitrust cases. Other cases in which lower courts, following the lead of *this* case, have simply substituted their judgments of the facts for that of the juries in antitrust cases include *England v. Chrysler Motor Corp.*, ___ F.2d ___ (9th Cir. 1974) and *Fount-Wip. Inc. v. Reddi-Wip, Inc.*, C.D. Cal., Civ. No. 71-3085-DWW (1973). Also see, *Rea v. Ford Motor Corp.*, 3rd Cir., 4/26/74, Civ. No. 73-1190.

The thrust of these cases, as best exemplified by counsel's argument in the *Burroughs* case (which is contrary to counsel's argument here), is that the "consequence" of this Court's decision in *Poller v. CBS*, supra, and other decisions by this Court[1], can be circumvented by lower courts granting judgments notwithstanding the verdict and/or new trials based upon the lower courts' view of the evidence. Antitrust defendants can *technically* succeed in this argument because this Court has never definitively applied the standard in *Poller* to judgments NOV and/or new trials, even though that standard quite clearly should be applied *a fortiori*.

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[1]*Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); and *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

The Petitioner does not dispute the fact that judgments NOV and/or new trials were not eliminated by the Constitutional dictate that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States." *Amendment VII.* But at the same time, the clear language of the Seventh Amendment should not be totally disregarded or so intolerably denied as it was to this Petitioner and to the private antitrust litigants who had the misfortune to follow this case. Where, as here, the Respondents did not contest the instructions *nor* the evidentiary rulings by the court below, as indeed they received extraordinarily favorable treatment, a court should not be permitted to simply substitute its judgment (much less, the Respondents' practically verbatim argument) for that of the jury.

In antitrust litigation, there can be no question presented to this Court that is more important than the standards to be applied by a lower court when it reviews the evidence supporting a plaintiff's successful antitrust verdict. All the decisions by this Court on the antitrust laws become meaningless and academic if they are only followed up to but not including the time at which a lower court reviews a plaintiff's verdict.

In this case, neither the District Court, nor the Court of Appeals, nor the Respondents paid even lip service to this Court's opinions in *Poller v. CBS,* supra, or *Continental Ore v. Union Carbide and Carbon Corp.,* supra. The absence of these cases from the opinions below and the reply brief underscores the fact that the rule in summary judgment (*Poller*) extended to directed verdicts

(*Continental*) must be further extended to judgments notwithstanding the verdict before it will be followed by lower courts.

The Respondents boldly assert that "*We* do not conceive the task of this Court to be to make another examination of the record." (Res. Br. p. 4.) This Court has never been reluctant to review a record where the Seventh Amendment, the previous decisions by this Court, and the viability of the private enforcement of the antitrust laws have been threatened.

According to the Respondents, it is all right for the courts below to "examine" the record and substitute their judgment of the facts for that of the jury; but it is not all right for this Court, or at least it is not the "task" of his Court, to determine whether the "examination" by the courts below was nothing more than a "reexamination" of the facts tried by the jury.

In *Beacon Theaters, Inc. v. Westover,* 359 U.S. 500 (1959) this Court granted certiorari because

> "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" 359 U.S. at 501.

This Court went on to hold that

> ". . . the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an *essential* part of the congressional plan for making competition rather than monopoly the rule of trade." 359 U.S. at 504.

The Petitioner seeks review of the decisions by the courts below which deprived this Petitioner of his "right" and deprived the antitrust laws of their "essential part."

Dated: May 20, 1974.

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